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No. 95-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	2
I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER UNION CONSENT IS A PREREQUISITE TO INITIATION OF THE NONSTATUTORY LABOR EXEMPTION	2
II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT IN AT LEAST TWO SIGNIFICANT RESPECTS	6
III. IF LEFT UNREVIEWED, THE COURT OF APPEALS' DECISION WILL HAVE WIDESPREAD HARMFUL CONSEQUENCES FOR LABOR RELATIONS AND COMPETITION	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases — Page

Amalgamated Meat Cutters Local No. 576 v. Wetterau Foods, Inc., 597 F.2d 133 (8th Cir. 1979) 4

Caldwell v. American Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995) 7, 8-9

Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) 4

Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391 (9th Cir. 1987) 5

In re Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992) 4, 5

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 7

Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ..... 2, *passim*

McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) 5

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 8

National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July 24, 1995) ..... 1, *passim*

NLRB v. Katz, 369 U.S. 736 (1962) 6-7

Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ..... 2, *passim*

Radovich v. NFL, 352 U.S. 445 (1957) 9

Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) 5

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 8

Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) 8

Statutes

Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 8

Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* 8

National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ..... *passim*

STATEMENT

The fact that the Government has filed an *amicus* brief on its own motion recommending without qualification that the Court grant the petition for certiorari in this case amply demonstrates that resolution of the important issue presented is essential to harmonization of the federal labor and antitrust laws. In particular, the Government fully agrees with petitioners that the Court of Appeals' dramatic expansion of the nonstatutory labor exemption "is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed," Brief for United States as Amicus Curiae 11—a view shared both by the federal antitrust enforcement agencies and the National Labor Relations Board. *See id.* at 1, 11 n.1. Moreover, the Government concurs that the present case "presents the issue for review in a clear fashion," and in every respect is the most "suitable vehicle" for exercise of the Court's certiorari jurisdiction. *Id.* at 12; *see id.* at 12-13.[1]

In their brief in opposition, respondents offer no genuine basis for disputing the compelling certworthiness of the issue or the Government's conclusion that this case provides the best opportunity for its resolution. Rather, in an evident effort to obscure and confuse, respondents have put forward a litany of arguments that mischaracterize numerous lower court decisions, misstate key labor law precepts, and mislead concerning the profound consequences of the Court of Appeals' extraordinary decision. In this reply brief, petitioners will endeavor to clear the haze.

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[1] The Government has suggested that the Court hold the petition in *Williams v. National Basketball Ass'n*, No. 95-137, pending a decision in the present case. U.S. Br. 13. Since the petitioners in *Williams* have apparently entered into recent negotiations with the NBA that may result in the withdrawal of their case, *see* Opp. 26, petitioners agree with the Government's suggestion and urge the Court to consider the present petition separately from the *Williams* petition.

ARGUMENT

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER UNION CONSENT IS A PREREQUISITE TO INITIATION OF THE NONSTATUTORY LABOR EXEMPTION.

Respondents strain mightily to cover up the division that exists among the circuits by creating a false distinction between the "sufficien[cy]" and the "necess[ity]" of union-employer agreement for application of the nonstatutory labor exemption. Opp. 9; *see id.* at 10-12. They claim that "*every* court of appeals to rule on the question" has rejected the necessity of union consent. *Id.* at 9 (emphasis in original) (citing *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July 24, 1995)). These claims completely fall apart upon careful inspection of the cases.

In reality, the D.C. Circuit in this case was faced with a significantly different question from that presented in *Powell* and *Williams*, both of which dealt with employer restraints previously agreed to by the unions and concededly once protected by the labor exemption. *Powell* and *Williams* thus involved the question of when, once begun, the exemption in such cases should *end*. Whether or not there is a clear divergence on that precise issue, those courts assuredly "strayed from the proper basis of the exemption" delineated by this Court, U.S. Br. 15. The D.C. Circuit's decision here, however, plainly *does* conflict with decisions of the Eighth, Fifth, Sixth and Ninth Circuits, including the seminal opinion in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), over the critical question of when the nonstatutory labor exemption *begins*.[2]

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[2] The Government states without discussion that "[s]ince *Powell*, no conflict in the circuits has developed." U.S. Br. 11. But it is apparent the Government is focusing only on the issue addressed

The Court of Appeals held below that upon "the *inception* of a collective bargaining relationship," the nonstatutory exemption immunizes all multi-employer restraints on competition for labor services regardless of union consent—that is, "once collective bargaining *begins*," the employees automatically lose their antitrust rights. App. 24a-25a (emphasis added). In stark contrast, the Eighth Circuit in *Mackey* explicitly held that "[t]o determine the applicability of the nonstatutory exemption *we must first decide* whether there has been any *agreement* between the [union and the employers] concerning the [restraint at issue]." 543 F.2d at 612 (emphasis added). Thus, the Eighth Circuit devised a test under which the exemption begins "*only* where the *agreement* sought to be exempted is *the product of bona fide arm's-length bargaining*," *id.* at 614 (emphasis added), and held that "the exemption *cannot be invoked*" where there has been no such bargaining "agreement." *Id.* at 623 (emphasis added). Respondents' assertion that "*Mackey* did not consider whether an agreement was *necessary* for the exemption to apply," Opp. 10 (emphasis in original), is utterly false.

In *Powell*, the Eighth Circuit explicitly reaffirmed the *Mackey* test, 930 F.2d at 1298—a test that concededly had been satisfied in *Powell* by the NFLPA's prior agreement to the challenged restraint. *Id.* at 1299. The *Powell* court simply addressed the distinct question of expiration: "[n]ow that the 1982 Agreement is terminated, . . . we must decide whether the nonstatutory labor exemption *has also expired* or, alternatively, whether under the circumstances of this case [it] *continues*." *Ibid.* (emphasis added).[3] *Powell*, therefore, does nothing to diminish the

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in its *amicus* brief in *Powell*—*i.e.*, whether "the employers' immunity *terminates* [upon impasse]." Id. at 10 (emphasis added). The Government overlooks the clear conflict that exists at the other end—regarding the exemption's application in the first instance.

[3] Respondents are simply wrong that *Powell* extended the labor exemption to "additional" restraints on competition that the NFL

conflict between the present case and *Mackey*.[4]

The three other circuits that have followed and applied the *Mackey* test for initiation of the nonstatutory exemption are also in clear conflict with the D.C. Circuit's decision here. In *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), the Fifth Circuit specifically held that where a restraint is imposed by members of a multi-employer bargaining unit and the "antitrust claims do *not* allege that [the employers] have entered into *agreements with any unions*," the exemption could not be invoked. *Id.* at 530-31 (emphasis added) (citing *Mackey*). Similarly, the Sixth Circuit in *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992), refused to apply the nonstatutory labor exemption to a unilateral agreement among car dealers to restrict showroom hours on the ground that the agreement was *not* the product of arm's length bargaining with the salesmen's unions. *Id.* at 462-67 (relying on *Mackey*). *See*

"had implemented *without union agreement*" after impasse. Opp. 10 (emphasis in original). In truth, the revisions in "Plan B" referred to in *Powell* involved only the *relaxation* for some players of the challenged restraints that the NFLPA had previously agreed to. *See* 930 F.2d at 1303 n.10 (the proposal unilaterally implemented by the League simply "offered free agency to some players but retained the [challenged reserve] system for many others").

[4] Respondents claim that *Amalgamated Meat Cutters Local No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), extended the nonstatutory exemption to a unilateral employer "restraint," Opp. 11 n.7, but that is misleading. The *Wetterau* court simply held that a routine striker replacement agreement did not violate antitrust law where it "had no anticompetitive effect" beyond labor relations at a single store. *Id.* at 136 & n.7 Moreover, striker replacement is a protected bargaining *tactic* under the labor laws, not a unilaterally imposed restraint on the terms of employment; thus, *Wetterau* is also explained on the basis of the important distinction between "tactics" and "terms" developed in this Court's preemption cases. *See* Pet. 24-25; App. 50a-58a & 53a-54a n.7 (Wald, J., dissenting).

also McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979) (adopting *Mackey* test).[5]

Finally, the Ninth Circuit in *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391 (9th Cir. 1987), specifically adopted the *Mackey* test and affirmed the application of the nonstatutory labor exemption where the defendants persuasively showed, *inter alia*, that the challenged labor project agreements "were the product of bona fide arm's length bargaining" with a union. *Id.* at 1394. Respondents cite the Ninth Circuit's earlier opinion in *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) (Kennedy, J.), which held that labor agreements other than collective bargaining agreements could fall within the exemption where they bear "a close and substantial economic relation to a union's legitimate attempt to organize a specific employer." *Id.* at 904. The court most certainly did *not* hold, as respondents imply, Opp. 12 n.9, that the exemption may be invoked *in the absence of union agreement*.

In the end, respondents cannot point to a single case, other than the Court of Appeals' decision below, in which a court has held the nonstatutory labor exemption to immunize multi-employer restraints that lack any hint of prior union consent. Respondents quote the Court of Appeals' frustration over the " 'dizzying array' " of rules proposed by the courts and commentators to govern the "termina[tion]" of the labor exemption—with some focusing on expiration of the bargaining agreement and others on impasse. Opp. 27 (quoting App. 21a). But, in truth, the considerable controversy regarding the termination of

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[5] Contrary to respondents' claim, the court in *Detroit Auto Dealers* did not rule that the dealers' restraint was "outside the scope of the collective bargaining process." Opp. 12 n.9. Indeed, several dealers had negotiated collective bargaining agreements with the unions, and "[s]ome [of the showroom] closings were in fact collectively bargained." 955 F.2d at 460 (internal quotation marks omitted); *see id.* at 467-69 & n.9 (applying the exemption to such agreements).

the nonstatutory exemption bespeaks a unitary consensus on the *beginning* of the exemption: it begins with union-employer *agreement*, as defined by *Mackey*. There would be no such "dizzying array" of proposals if the other courts had recognized what the D.C. Circuit and respondents now urge—that union agreement is irrelevant to the entire exemption and that all that matters is the "inception of a collective bargaining relationship." App. 24a.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT IN AT LEAST TWO SIGNIFICANT RESPECTS.

In response to our arguments that the D.C. Circuit's decision conflicts with this Court's cases requiring a reconciliation between the antitrust laws and competing federal statutes and with this Court's labor preemption decisions, respondents offer only a series of fundamental misstatements about the prerogatives and duties of parties under the labor laws.[6]

First, respondents repeatedly intone that employers have a "right" affirmatively granted by the labor laws to implement their bargaining proposals upon impasse, and that this "fundamental labor law right" would be infringed if subjected to antitrust scrutiny. Opp. 4, 15, 20-21 & n.17, 24. That simply is not so. Employers, like unions, have no affirmative rights granted by the labor laws; the only "rights" created by the NLRA are the employees' rights under § 7 to engage in or refrain from concerted activities. *See* 29 U.S.C. § 157. The employers' ability to implement their proposals upon impasse is merely one of many *prerogatives* the employers enjoy that find their source in other areas of the law, principally common law. Within the context of the bargaining process, these employer prerogatives are *regulated* to one degree or another by the labor laws. *See, e.g., NLRB v.*

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[6] Respondents are flatly wrong when they claim that the NLRA implied preemption decisions were not raised in the Court of Appeals. Opp. 16-17. These cases were discussed extensively in the dissent, *see* App. 54a-57a, and in the petition for rehearing.

Katz, 369 U.S. 736, 745 (1962). To the extent they are *unregulated*, however—as they are to a large extent upon impasse—the application of the antitrust laws presents no irreconcilable conflict. Individual employers remain free upon impasse to implement their proposals unilaterally; they simply cannot do so as a cartel without risking the same antitrust liability that would ordinarily apply.

Second, respondents claim that petitioners' and the Government's arguments depend upon the assumption that union members have a right to negotiate individually over the terms and conditions of their employment. Opp. 14. Not true. We claim only that unionized employees, whether individually or as a group, have the same rights as nonunion employees to protection from employer collusion in setting employment terms—absent agreement to the contrary—as this Court's implied preemption decisions make plain. *See* Pet. 24-25. Those rights are not in tension with the labor laws. Moreover, this Court has emphasized the "care taken" in its decisions to "reserve a field for the individual contract, even in industries covered by the [NLRA]." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). The Court explained that where there is "great variation in circumstances of employment or capacity of employees"—as is clearly the case, for example, in professional sports and entertainment—it is "possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." *Id.* at 338.[7]

Third, respondents argue that employers enjoy protection when they engage in the tactic of a lockout, even though, respondents claim, a lockout "would restrain the labor 'market' far more severely than the restraint at issue here." Opp. 19. The latter point is assuredly un-

[7] Respondents mistakenly assert that the terms of the individual's employment are left exclusively to the collective bargaining process "[s]ubject [only] to federal statutes *specifically* overriding the NLRA." Opp. 14 (emphasis added) (quoting *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995)

true. Bargaining tactics like lockouts and strikes impose their painful economic consequences on employers as well as on employees and are thus a real spur to mutual compromise. The employers' unilateral implementation of a salary term, however, imposes no reciprocal costs on the employers. For that reason, a lockout is likely to be shortlived, while a unilaterally implemented salary restraint will be maintained for as long as the employers can get away with it—and where, as here, the costs of the restraint are imposed on only a small subset of employees, there is little incentive for the union to strike and thus little chance (absent an antitrust action) that the employers will back down.

In short, unlike a lockout, which *is* calculated to produce a bargaining agreement, the multi-employer restraint at issue in the present case was designed precisely to *avoid* agreement with the union. Antitrust immunity for this kind of restraint will inevitably be destructive of both labor and antitrust policies.[8]

(citing the Fair Labor Standards Act and the Civil Rights Act of 1964 as examples). In truth, the Fair Labor Standards Act and the Civil Rights Act mandate certain standards that apply to collectively bargained employment terms without any "specific" override of the NLRA. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985) ("[I]t never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees.") (emphasis in original). The "backdrop" rights created by those statutes apply generally to employment terms in exactly the same way that the background rights created by the antitrust laws do.

[8] Respondents rely by "analogy" on the Second Circuit's recent *Garmon* preemption decision in *Caldwell v. American Basketball Ass'n*, 66 F.3d at 527. Opp. 17. Although *Caldwell* was correctly decided under the doctrine of preemption of state-law unfair labor practice claims, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959), *Caldwell*'s expansive reasoning, which simply reiterates the Second Circuit's earlier opinions in *Williams* and *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987), exposes the radical potential of the D.C. Circuit's decision here. Suppose the plaintiff in *Caldwell* had been collectively boycotted not for his union activity but for his political activities or

III. IF LEFT UNREVIEWED, THE COURT OF APPEALS' DECISION WILL HAVE WIDESPREAD HARMFUL CONSEQUENCES FOR LABOR RELATIONS AND COMPETITION.

Respondents blithely assert that the issue presented in the petition will have no impact beyond the narrow world of professional sports and that, even within that world, "this case is of no continuing significance," since labor relations throughout sports "are now quite stable" and will remain so "for some years to come." Opp. 26-27. Those assertions are simply extraordinary.

If left in place, the D.C. Circuit's decision promises to alter the scope of the judge-made labor exemption in every context in which it has been invoked, but especially in industries where individual contract negotiations occur within the framework of a basic collective bargaining agreement. In the first place, respondents simply pretend away the turbulent experiences that have befallen labor relations in professional football, hockey and basketball as a result of decisions like the present one. *See* Brief for National Hockey League Players Ass'n and National Football League Players Ass'n as Amici Curiae in Support of Petitioners 5-10; U.S. Br. 11-12.[10] This turbulence, moreover, is likely to be a recurring—indeed, almost yearly—phenomenon, since each of the four major sports has a four to six year bargaining cycle, and in the

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for playing in another league, like the plaintiff in *Radovich v. NFL*, 352 U.S. 445 (1957). The reasoning of *Caldwell*, like that of the Court of the Appeals in the present case, would clothe the employers' conduct in immunity and would leave the plaintiff with no redress other than whatever grievance procedure may be available under a collective bargaining agreement. (In *Caldwell*, there was no agreement in place and no such procedure available.)

[10] The decision below is also likely to have a significant impact on labor relations in major league baseball if pending legislation is enacted. *See* Motion of Major League Baseball Players Ass'n for Leave To File Brief Amicus Curiae in Support of Petitioners 2 ("S. 627 provides only that the antitrust laws that apply to all other businesses [will] also 'apply to the business of professional major league baseball.' ").

current climate most of these bargaining cycles end with a work stoppage. Coincidentally, the absence of a current major labor flareup in professional sports makes this a particularly desirable time for the Court to set the rules straight on the proper interplay between the labor and antitrust laws.

Beyond the sports world, respondents ignore the impact the Court of Appeals' decision could have in the hugely important entertainment industry, where talented artists negotiate individual deals within the context of industry-wide bargaining agreements.[11] Finally, they completely overlook the great variety of trades and industries involved in the many cases both in this Court and in the lower courts where the scope of the labor exemption has been at issue.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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[11] *See* Brief for Screen Actors Guild, Inc., *et al.*, as Amici Curiae in Support of Petitioners 3-5. *See also id.* at 6 ("The *Brown* decision would [for example] provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million [realized from respondents' restraint].").